

No. 43693-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sergey Fedoruk,

Appellant.

Cowlitz County Superior Court

Cause No. 11-1-00827-1

The Honorable Judge Marilyn K. Haan

Appellant's Supplemental Brief

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SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct requiring reversal.
2. The prosecutor improperly expressed a personal opinion in closing arguments.
3. The prosecutor improperly appealed to passion, prejudice, and emotion during closing argument.
4. The prosecutor improperly showed jurors PowerPoint slides of photographic exhibits with inappropriate commentary.
5. The prosecutor improperly showed jurors a PowerPoint presentation with the phrase “Murder 2” written in red letters atop almost every slide.
6. The prosecutor improperly started her PowerPoint presentation with a slide that said “Guilty Murder 2” in oversized red letters.
7. The prosecutor improperly ended her PowerPoint presentation with a slide that said “Murder 2 Guilty” in oversized letters, with the phrase “Murder 2” enhanced by shadow effects.
8. The prosecutor undermined the presumption of innocence and shifted the burden of proof during closing argument.
9. The prosecutor improperly showed jurors PowerPoint slides claiming that Mr. Fedoruk agreed with certain evidence.
10. The prosecutor improperly showed jurors a PowerPoint slide urging jurors to trust their intuition rather than the evidence in reaching a guilty verdict.
11. Mr. Fedoruk was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
12. Defense counsel was ineffective for failing to object to prosecutorial misconduct in the prosecutor’s PowerPoint presentation.

SUPPLEMENTAL ISSUES

1. A prosecutor may not express a personal opinion or appeal to jurors' passions, prejudices, and emotions during closing arguments. Here, the prosecutor added commentary to photographic exhibits, inappropriately appealed to passion, prejudice, and emotion, and suggested that jurors trust their intuition rather than the evidence. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Fedoruk's right to due process under the Fourteenth Amendment and Wash. Const. art. I § 3?

2. A prosecuting attorney may not shift the burden of proof in closing argument. Here, the prosecuting attorney improperly showed jurors slides suggesting that Mr. Fedoruk agreed with some of the prosecution evidence. Did the prosecutor commit misconduct that infringed Mr. Fedoruk's Fourteenth Amendment right to due process?

3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to repeated instances of prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Fedoruk denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

SUPPLEMENTAL FACTS

During her closing argument, the state's attorney used a PowerPoint slide presentation. Without any objection by the defense, she put onscreen a total of thirty-five slides. Respondent's PowerPoint Presentation, Supp. CP.

The state alleged there were factual "agreements" and listed these in red and white on three separate slides, with "Murder 2" and "Agreements" at the top of each. Slide 14, 15, 16. The slides listed conclusions from the evidence that the prosecutor argued in her closing were not contested by the defense, concluding they were therefore agreed. RP 1775-1779. One slide, including factual allegations, read in blue: "Intuition is a POWERFUL thing". Slide 22. Slide 31 was a target, with Mr. Fedoruk's name indicated at the center of it, with six allegations in a circle around it, with red arrows. Slide 31.

Three of the slides added the caption "Murder 2," in large red letters, to graphic images of Mr. Ishchenko's body. *See* Respondent's PowerPoint Presentation slides 3, 33, 34.¹

¹ The phrase "Murder 2" was also repeated on other slides throughout the presentation.

These also included bullet points outlining the state's theory of the case, summaries of the jury instructions, More than half of these slides contained movement or sound along with the visual content.

Respondent's PowerPoint Presentation, Supp. CP.

The slides used during the trial were filed after Mr. Fedoruk's Opening Brief was completed.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a "substantial likelihood the misconduct affected the jury verdict." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)). The lack of a defense objection at trial does not preclude review if the misconduct was "flagrant and ill-intentioned." *Glasmann*, 175 Wn.2d at 704. Furthermore, misconduct may be raised for the first time on review if it is manifest error affecting a constitutional right. *State v. Fleming*, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996); RAP 2.5(a)(3).

B. The prosecutor improperly used PowerPoint slides that expressed her personal opinions, appealed to jurors' passions, prejudices, and

emotions, urged a conviction on the basis of “intuition” rather than evidence, undermined the presumption of innocence, and shifted the burden of proof.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasman*, 175 Wn.2d at 703-704; U.S. Const.

Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, § 22.

Prosecutorial misconduct can deprive an accused person of this right.

Glasman, 175 Wn.2d at 703-704. The state must seek convictions based only on probative evidence and sound reason, rather than arguments calculated to inflame the passions or prejudices of the jury. *Id.*

A prosecutor may not use her position of power and prestige to sway the jury. *Id.*, at 706. It is likewise misconduct to express an individual opinion of the defendant’s guilt. *Id.* A prosecutor may not show jurors evidence that has not been admitted at trial. *Id.*, at 705. Modifying photographs by adding captions is equivalent to showing jurors unadmitted evidence. *Id.*, at 706. Furthermore, images may sway a jury in ways that words cannot. *Id.*, at 707.

It is improper for the prosecutor to make a closing argument that shifts the burden of proof. *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006). Where an accused person enters a plea of not guilty, that plea puts at issue each and every element of the charged crime. *See* Instruction No. 3, CP

140. It is misconduct even to imply that the defense has a duty to present evidence relating to an element of the charged crime. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). Such misconduct affects a constitutional right and requires reversal unless the error is harmless beyond a reasonable doubt. *Id.*

In this case, the prosecutor committed misconduct by adding the caption “Murder 2,” in large red letters, to graphic images of Mr. Ishchenko’s body. *See* PowerPoint, slides 3, 33, 34.² By adding the caption “Murder 2” to these photographs, the prosecutor improperly expressed her personal opinion that Mr. Fedoruk was guilty and showed jurors “evidence” that had not been admitted at trial. Furthermore, she sought to appeal to the jury’s passions, prejudices, and emotions by attaching her commentary to photos that were particularly graphic. *See* PowerPoint, slides 3, 33, 34. The problem was exacerbated by the repeated use of the phrase “Murder 2”.

In addition, the prosecutor improperly used her PowerPoint to emphasize the theme of “intuition,” which was a focus of her oral presentation. *See* Appellant’s Opening Brief, pp. 40-45. In particular, she highlighted the phrase “Intuition is a powerful thing,” a sentence that she

² The phrase “Murder 2” was also repeated on other slides throughout the presentation. The last slide contained in large print, in red, “Murder 2 GUILTY”. Slide 35.

repeated throughout her oral presentation. *See* PowerPoint, slide 22; RP 1784-1801. By focusing on intuition rather than evidence, the state undermined the jury's commitment to strictly observe the law and to take appropriate care in reaching a verdict. *Glasmann*, 175 Wn.2d at 704, 709.

Finally, the prosecutor showed jurors images and text suggesting that Mr. Fedoruk agreed with the prosecutor's evidence. *See* PowerPoint, slides 14, 15, and 16. This compounded her spoken misconduct regarding the burden of proof. *See* Appellant's Opening Brief, pp. 40-45. By using the word "agreements" on three slides, and by adding this caption to photographic exhibits, the prosecutor undermined the presumption of innocence and shifted the burden of proof. The prosecutor's closing—including her spoken words, the words on the PowerPoint, and the images presented with captions—conveyed a clear message: that the absence of contradictory evidence could be taken as agreement to a particular point or theory. *See* Appellant's Opening Brief, pp. 40-45.

It is likely that jurors applied this message (whether consciously or unconsciously) to *any* uncontradicted piece of evidence or theory, not just to those conclusions listed by the prosecutor. Because of this, the misconduct stretched beyond those specific items and infected the whole of the state's case.

An accused person “is constitutionally endowed with an overriding presumption of innocence.” *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This presumption “is the bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The prosecution “must prove every element of its case beyond a reasonable doubt.” *Id.* (citing *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). A defendant may sit silent, present no evidence, and still be acquitted. Failure to contradict certain evidence or argue against a theory espoused by the state is not an agreement to that evidence or theory.

The prosecutor’s closing argument ran counter to these very basic principles. The appeals to passion and prejudice, the focus on “intuition” rather than evidence, the efforts to undermine the presumption of innocence, and the arguments shifting the burden of proof violated Mr. Fedoruk’s due process right to a fair trial. *Glasmann*, 175 Wn.2d at 703-704. By augmenting her improper comments with visuals—PowerPoint slides, showing text and captioned images—the prosecutor committed misconduct that was flagrant and ill-intentioned, and could not have been cured by an instruction had defense counsel objected. *Id.*, at 707.

First, the improper slides comprised one fifth of the entire slide show. The misconduct pervaded the entire closing argument. The second

slide in the presentation showed Ishchenko's body with the caption "Murder 2" in large red letters. The 33rd and 34th slides (out of 35) also showed his body with the caption "Murder 2" in large red letters.

Second, the prosecutor accompanied her presentation with improper comments conveying her personal beliefs, focusing on intuition rather than evidence, undermining the presumption of innocence, and shifting the burden of proof. *See* Appellant's Opening Brief, pp. 40-45. Third, as noted in *Glasmann*, "[h]ighly prejudicial images may sway a jury in ways that words cannot.. [and thus] may be very difficult to overcome with an instruction." *Id.*, at 707. Jurors are particularly susceptible to this sort of misconduct when it occurs during closing arguments. *Id.*, at 707-708

The misconduct was especially egregious in this case. Throughout the trial, the jury became accustomed to seeing evidence on screen after it had been admitted and publication approved by the judge. Jurors may well have assumed that the judge approved the slides of images with captions, such as those used here. As in *Glasmann*, "[t]he prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts." *Id.*, at 708.

There is a substantial likelihood that the misconduct affected the verdict. Nor is there any possibility that the misconduct could have been

cured by an instruction. The prosecutor's efforts to manipulate jurors to convict without critically examining the evidence denied Mr. Fedoruk a fair trial. *Id.*, at 714. Accordingly, Mr. Fedoruk's conviction must be reversed, and the case remanded for a new trial. *Id.*

II. MR. FEDORUK WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. Defense counsel should have objected to the improper PowerPoint slides presented during the prosecutor's closing arguments.³

In this case, defense counsel should have objected to the flagrant and ill intentioned misconduct contained in the prosecutor's PowerPoint presentation. Defense counsel "must be held to know" that the kind of misconduct engaged in by the prosecutor was improper. *See Glasmann*, 175 Wn.2d at 706.

The misconduct was pervasive, flagrant, and ill intentioned: she expressed her personal opinion, used the power and prestige of her office

³ The standards for an ineffective assistance claim are fully set forth in Mr. Fedoruk's Opening Brief at pp. 18-20.

to sway jurors, relied on appeals to emotion, passion, and prejudice rather than reason, focused on “intuition” rather than evidence, and displayed text and captioned images with the aim of manipulating jurors into voting guilty. *Cf. Glasmann*.

Cases and professional standards available before trial “clearly warned against the conduct here.” *Glasmann*, 175 Wn.2d at 707. Counsel’s performance thus fell below an objective standard of reasonableness: at a minimum, Mr. Fedoruk’s lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

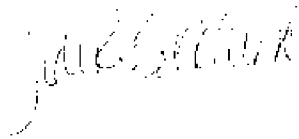
Furthermore, Mr. Fedoruk was prejudiced by the error. The prosecutor’s improper multimedia show substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann*, 175 Wn.2d at 708. The failure to object deprived Mr. Fedoruk of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

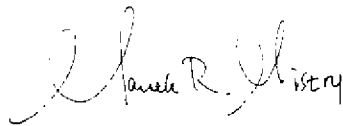
For the foregoing reasons, Mr. Fedoruk's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on May 23, 2013.

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I certify that on today's date:

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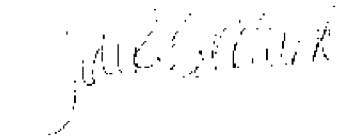
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 23, 2013.



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